(4)

No. 00-493

Supreme Court, U.S.
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In The

Supreme Court of the United States

AUSTIN, NICHOLS & CO., INCORPORATED; BACARDI IMPORTS, INC.; JIM BEAM BRANDS CO.; BROWN-FORMAN CORPORATION; DAVID SHERMAN CORPORATION; REMY AMERIQUE, INC.; SOUTHERN WINE & SPIRITS OF AMERICA, INC., d/b/a Shaw Ross International Importers,

Petitioners,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Deputy Commissioner of the Administration Division of the Department of Administrative Services and as Director of the Fiscal Division of the Department of Administrative Services and as State Treasurer for the State of Georgia,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A. THERE IS NO PROCEDURAL BAR.

1. *No Independent State Ground.* All of the certiorari issues, including the "subsidiary" issues, *see* Sup. Ct. R. 14.1(a), were extensively presented to the Georgia Supreme Court for review. *E.g.*, App T. This is not a case in which Petitioners "did not ask the Supreme Court of [Georgia] to review the judgment entered by" the Superior Court as in *Banks v. California*, 395 U.S. 708, 708 (1969), and other cases cited. *See* Brf. in Opp. ("Opp") at 9 n.17. Although first calling it "inapplicable," *id.* at 9, Respondents later maintain that the asserted procedural bar "can also be viewed in terms" of the "independent and adequate state ground" line of cases referred to in the "next section" of their "Brief," *id.* at 14 n.26. There, Respondents rely, *inter alia*, upon *Michigan v. Long*, 463 U.S. 1032 (1983). Opp at 15. *Long* established "a conclusive presumption of jurisdiction":

> "[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

Coleman v. Thompson, 501 U.S. 722, 733 (1991) (cit. omit.) The *Long* presumption applies to uphold the Court's jurisdiction in this case.

Respondents' first and foremost argument throughout was that Petitioners' claims are barred by the Georgia Supreme Court's decision, based upon Federal law, in *Heublein, Inc. v. State*, 256 Ga. 578, *app. dism.*, 483 U.S. 1013 (1987). The Superior Court made this the first ground of its decision. App A7 (*Heublein* "bar[s] Plaintiff Heublein,

Inc.'s effort" and "bar[s] the other Plaintiffs' challenge"). After Petitioners had filed their opening brief with the Georgia Supreme Court addressing the *Heublein* bar, *e.g.*, App T6-11, Respondents filed their motion to dismiss, emphasizing that "the constitutionality of the 1985 tax statute had already been upheld in a prior suit by this same group of plaintiffs. *See Heublein*" and that the Superior "court ruled . . . that the tax statute was constitutional . . . under . . . *Heublein*." Mot. to Dism. at 1-2. Petitioners opposed dismissal on discretionary appeal grounds by pointing out, *inter alia*, the statutory requirement of *two* decisions below – one by Superior Court and one by administrative agency – and that the Revenue Commissioner in this case never issued a ruling. *E.g.*, App U8-12. Respondents then filed their opening brief arguing that "*Heublein* is preclusive." Brf. of Appellees (June 22, 2000) at 5. Respondents next filed a Reply in support of their motion, again invoking *Heublein* and arguing *first* that

> it was this very group of refund claimants that has already pursued and obtained a decision from the *appellate* courts in *Heublein* on the merits of the unconstitutionality of the very same liquor tax statute they are challenging again in the instant case. The *Heublein* decision was not a "narrow" one, as Appellants now assert,[1] but a comprehensive review of the Twenty-first Amendment and a rejection of all of the asserted constitutional challenges to the validity of the tax. The correctness of *Heublein* and of the lower court's decision herein (because, inter alia, the statute clearly implicates

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[1] Quoting Petitioners and their merits argument against the *Heublein* bar.

> core concerns under the Twenty-first Amendment) is addressed in detail in the Brief of Appellees.

Reply (June 27, 2000) (emph. orig.) at 4; *see also id.* at 6 ("already upheld in the *Heublein*"). With this, Respondents urged the Georgia Supreme Court to dismiss because the earlier "*Heublein* decision" was said to constitute "a rejection of all of the asserted constitutional challenges to the validity of the tax." To meet the statutory requirement of two decisions below, Respondents made this *second* argument:

> This case falls within the scope and spirit of the discretionary appeal statute, as shown by the many cases cited in Appellees' Motion. It makes no difference that the denial of the administrative claims for refund was by operation of law rather than by written denial by the Commissioner, nor that Appellants attempted to join to their suit for refund additional claims or theories. The underlying and overall nature and purpose of the suit was to seek judicial review of the Revenue Department's failure to grant Appellants' refund claims, which were based upon the asserted unconstitutionality of the import tax on distilled spirits. Since a ruling on the constitutional issue could only be rendered by the judiciary, the lack of written rejection by the Revenue Department of these claims was particularly inconsequential in this case. Indeed, a binding decision, precluding the administrative grant of these refund claims, had already been rendered by the judiciary on the validity of the instant tax in *Heublein* . . . Thus, *multiple judicial* tribunals have already ruled upon the merits of the asserted basis for these refund claims.

Reply at 3-4 (emph. orig.) Here, without citation to authority, Respondents first urged the Court to use the "binding" Federal law decision in *Heublein* to excuse the absence of a lower "decision[ ] of . . . state . . . administrative agenc[y]" – thereafter to be "review[ed]" by "decision[ ] of the superior court[ ]" – as required by O.C.G.A. § 5-6-35(a)(1). *See also* App U8-9. Respondents then urged the Court to count its own 1987 "binding decision" in *Heublein*, together with the Superior Court's Final Order, to come up with decisions by "multiple judicial tribunals . . . upon the merits." Reply at 4 (emph. omit.) The Court later passed a one-sentence Order: "Upon consideration of the Motion to Dismiss filed in this case, it is ordered that this appeal be hereby dismissed." App B1.

If the Court adopted Respondents' first line of argumentation, its dismissal rested upon the prior adjudication of Federal law in *Heublein* and thus " 'fairly appears to rest primarily on federal law.' " *Coleman*, 501 U.S. at 733. If the Court adopted Respondents' second line, the dismissal rested upon the proposition that the prior 1987 Federal law adjudication in *Heublein* both displaced the lower administrative decision required by statute and itself qualified as one of two lower tribunal decisions – and, as such, " 'fairly appears . . . to be interwoven with federal law.' " *Id.*[2] Under these circumstances, and in the absence of "a plain statement" otherwise, *Long*'s "conclusive presumption" obtains. The *Long* presumption and its plain statement requirement have been the law since

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[2] *See also Ake v. Oklahoma*, 470 U.S. 68, 75 (1985): "[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded."

1983. This Court has noted that, " ' "since *Long*, we repeatedly have followed [its] 'plain statement' requirement." ' " *Arizona v. Evans*, 514 U.S. 1, 7 n.2 (1995) (cit. omit., alter. in orig.) (noting, in 1995, some 8 instances). Certainly, there is no surprise in applying the requirement here.

Evans reaffirmed this Court's "authority as final arbiter of the United States Constitution," noting that this authority "could be eroded by a lack of clarity in state-court decisions" and how important it is

> "that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from opinions in such cases. . . . For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states."

Id. at 9 (cit. omit., alter. in orig.). After arduous litigation, the Georgia courts have now twice upheld the Federal constitutionality of Georgia's "import" approach: once in *Heublein* and now a second time in the present reaffirmation of *Heublein*. In so doing, they have come into direct conflict with the Florida Supreme Court over the Federal constitutionality of the import approach.[3] In so doing with reliance upon one of three possible approaches to

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[3] *See Ivey v. Bacardi Imps. Co.*, 541 So.2d 1129 (Fla. 1989); *Division of Alc. Bevs. & Tob. v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988) (subseq. hist. omit.)

21st Amendment immunity, they have sharply pointed up a conflict among Circuits.[4] More important (especially when other States such as Florida have brought themselves into compliance), the Georgia courts have done so in a way that favors Georgia commerce over the commerce of the other 49 States, not to mention foreign commerce. There is no other recourse for Petitioners or the 49 other States to bring Georgia into compliance with the Federal constitution. Fortunately, the Georgia courts are not the "final arbiter of the United States Constitution," their " 'ambiguous or obscure adjudications . . . do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action,' " and "they are *not* free from the final authority of this Court." *Evans*, 514 U.S. at 8-9 (emph. orig.)

2. ***No Adequate State Ground.*** This Court has "held that only a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court." *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (cit. omit.)[5] There is no Georgia authority whereby a prior court decision in another case (*Heublein*) will first excuse the requirement of a lower administrative decision in the case on appeal and, then, will itself be counted, together with the Superior Court's decision, to render a sum total of two decisions by "multiple judicial tribunals" in purported compliance

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[4] *See Cooper v. McBeath*, 11 F.3d 547 (5th Cir.) (per Jones, J.), *cert. denied*, 512 U.S. 1205 (1994); *Milton S. Kronheim & Co. v. District of Colombia*, 91 F.3d 193 (D.C. Cir. 1996) (per Sentelle, J.), *cert. denied*, 520 U.S. 1186 (1997); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (per Easterbrook, J.)

[5] *See also Edwards v. Carpenter*, 120 S. Ct. 1587, 1590 (2000) (" 'firmly established and regularly followed' at the time it was applied" (cit. omit.))

with the discretionary appeal statute. Georgia authorities are directly to the contrary. *See* App U1-21.[6] Indeed, one prior Georgia case upholds, under virtually identical circumstances, a direct appeal *by the State* to defeat a Federal claim. *See* App U21-24 (re *James B. Beam Distilling Co. v. State*, 259 Ga. 363 (1989) (subseq. hist. omit.))[7] "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to

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[6] Respondents now suggest that "Petitioners filed their suits . . . prior to issuance of a written denial," Opp at 11, but they were required to do so by statute on pain of losing their claims. *See* App U18-21. Respondents also suggest that "audit work" continued even after the court filings, leading to a "Department determin[ation] that the claims were without merit." But it has already been adjudicated that the "Department . . . dragged its feet in processing" and judicially admitted that the "Department took no action." *Age Int'l, Inc. v. Miller*, 830 F. Supp. 1484, 1496-97 (N.D. Ga. 1993), *aff'd*, 37 F.3d 637 (11th Cir. 1994); *see also* App U13-15. Certainly, no such administrative determination was memorialized and issued to Petitioners, and the Georgia cases require administrative action far more affirmative than this silence to qualify as a "decision" under the discretionary appeal statute. *See* App U16-17. Elsewhere, Respondents suggest that this "Department determin[ation]" is not the relevant decision, but rather earlier "deni[als] by operation of law," Opp at 12, occurring simultaneously on the dates Petitioners filed their suits. There is no support for this alternative position.

[7] Respondents argue that *Beam* only shows that the appellee there "missed" a defense, Opp at 13, but this Court, in observance of its "independent obligation to ascertain" adequacy, *Howlett v. Rose*, 496 U.S. 356, 366 n.14 (1990); *see also Abie St. Bank v. Bryan*, 282 U.S. 765, 773 (1931), concludes that, when the prior direct appeal was accepted, it "must therefore have been found by the [Georgia Supreme Court] to be within" its jurisdiction. *Southern Elec. Co. v. Stoddard*, 269 U.S. 186, 190 (1925).

all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). Certainly, a Federal "cause of action must not be discriminated against because it is a federal one." *Herb v. Pitcairn*, 324 U.S. 117, 123 (1945); *see also Howlett*, 496 U.S. at 366 ("concern that the state court may be evading federal law and discriminating against federal causes"). Even if the Georgia Supreme Court was innovating, a new procedural requirement is not adequate to defeat this Court's jurisdiction here "because no prior Georgia case . . . gives notice of the existence of [the] requirement." *Wright v. Georgia*, 373 U.S. 284, 291 (1963). " '[P]etitioner[s] could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court.' " *Id.* (cit. omit., alter. in pt. supp.)[8] This Court has definitively established that "Georgia's application" of a later created rule "does not even remotely satisfy" the firmly established test, obviating any "need to dwell on . . . the second . . . requirement" of consistent application. *Ford*, 498 U.S. at 424-25.

B. THE OTHER IMPEDIMENTS ASSERTED ARE LIKEWISE UNFOUNDED.

1. ***Standing to Seek a Refund.*** Because of competitive injury, Petitioners have standing to seek a refund notwithstanding Respondents' pass-on defense. *See* App

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[8] For similar reasons, the Georgia Supreme Court itself sometimes applies procedural innovations prospectively only. *See* App U25-26; *but see Reich v. Collins*, 262 Ga. 625 (1992); *Ford v. State*, 257 Ga. 661 (1987); *Wright v. State*, 217 Ga. 453 (1961) (all subseq. hists. omit.)

T61-62. Even if not, Petitioners are also seeking declaratory and injunctive relief.[9] Accordingly, there is no standing impediment to this Court's consideration of the certiorari issues.[10]

2. ***No "Vague and Empty" Record State Ground.*** In *Ellis v. Dixon*, 349 U.S. 458, 464 (1955), upon which Respondents rely, Opp at 18, the record was so "vague and empty" that the Court concluded that, "if we could not ourselves decide . . . the constitutional issues tendered, we consider that by the same token the New York Court . . . was entirely justified in refusing to pass on them," thereby presenting "an adequate nonfederal ground.". The state of the record did not propel the Georgia courts to refuse to pass on Petitioners' Federal claims, and a state ground should not now be manufactured. *See*

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[9] After the Federal courts applied the Tax Injunction Act for the "sole reason" that this kind of relief was deemed available in state court, *Age*, 830 F. Supp. at 1501, Petitioners amended. *See* App P. Ironically, the Georgia courts declined to address Petitioners' claims here, despite repeated assertions. *E.g.*, App Q6-8, 117-19; App T11-13.

[10] Nor was there any abandonment, "essential[ ]" or otherwise, Opp at 27, of any part of the challenge to O.C.G.A. § 3-4-60. *E.g.*, App N7-9; App Q59, 67-68, 81, 91, 95, 100, 103; App S12-14; App T16-18. Moreover, Respondents never challenged Petitioners' standing here, and it is too late to do so now; this Court may review a state case even if there was "an available state ground for decision on which the state court could properly have relied," but did not. *Long*, 463 U.S. at 1038 n.4. In any event, standing rests on competitive injury: The requirement to use "Georgia grown products" is one of the prerequisites to favorable tax treatment, *see* O.C.G.A. § 3-4-60, a prerequisite that Petitioners, and their beverages produced out-of-state and overseas, cannot satisfy without incurring significantly higher costs than the in-state beverages are subject to.

supra note 10.[11] Respondents' contentions about the reliability and significance of various types of evidence go to the merits of (some of) the very questions the Petition presents. *See* Pet. Qs. 1a, 1b, 1c, 2a & 2b. Indeed, Respondents concede that the governing Federal law can be reviewed on the claims as "alleged." Opp at 21. The claims were in any event amply supported by an extensive evidentiary showing. *E.g.*, App Q63-116.

3. ***No Bar to the Petition's Second Question.*** The second question is not about "a Canada-U.S. trade dispute," Opp at 24, but rather concerns 21st Amendment immunity to a Foreign Commerce Clause violation. Nor was the claim "effectively abandoned." *E.g.*, App N18, 33; App O6-7; App Q3-4, 6, 31, 38-43, 113-17; App T2-6, 32-33, 57-60.

Petitioners submit that there is no procedural bar and pray that the Petition be granted.

Respectfully submitted,

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[11] Indeed, the 21st Amendment, and *Federal* law generally, was set up below as an evidentiary disqualification. *See* App T44-45; *see also id.* at T23-30.